In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 246

HERMAN MOSES, ET AL., APPELLANTS

v.

THE STATE OF WASHINGTON, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

In the memorandum on behalf of the United States filed at the Court's invitation in this case and Nos. 247 and 319, we expressed the view that the issue as to "the extent of off-reservation fishing rights which have been guaranteed to the Indians by federal treaties" "seems precluded in No. 246" (Mem. 3). We reached that conclusion because the State Supreme Court held that appellants' failure to make timely assignments of error barred them, under local procedural rules, from challenging the trial court's findings of fact (J.S. A48), and because one of these factual findings was that appellants' ancestors were not signatories to the Treaty of Point Elliot under

284-516—67

which they claim (J.S. A49–A50). Accepting that finding as final for the purposes of this case, it seemed to follow that they were foreclosed from asserting treaty fishing rights, as the court below held (J.S. A50).

In a reply to our memorandum, appellants now assert that even accepting all the trail court's findings of fact, they may yet be beneficiaries of the Treaty of Point Elliot. That result is premised on the conceded fact that, although non-signatories, their ancestors were named as contracting parties in the preamble to the treaty and were subsequently dealt with as parties to the treaty. Although the court below did not advert to it, we suppose this contention—essentially raising a question of law—would not have been viewed as procedurally foreclosed there, and, accordingly, remains open here. Certainly, the point is not frivolous. Indeed, it is the view of the Department of the Interior that the Smalh-kamish, Skope-ahmish and St-kah-mish Tribes, named in the preamble, were beneficiaries of the Treaty of Point Elliot, although their representatives were not among the signatories, and that at least some members of the Muckleshoot Tribe (including the individual appellants) presently hold rights under the treaty as descendants of those Indians. Whether this question, as it affects the fishing rights of the descendants of these particular tribes, merits review in this Court is, of course, a discrete

matter. But, at all events, we deem it appropriate to correct the implication conveyed in our earlier memorandum that the issue is foreclosed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1967.

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